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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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| In the Matter of |) | |
| |) | |
| 1998 Biennial Regulatory Review -- |) | |
| Spectrum Aggregation Limits for |) | WT Docket No. 98-205 |
| Wireless Telecommunications Carriers |) | |
| |) | |
| Cellular Telecommunications Industry |) | |
| Association's Petition for Forbearance |) | |
| From the 45 MHz CMRS Spectrum Cap |) | |
| |) | |
| Amendment of Parts 20 and 24 of the |) | WT Docket No. 96-59 |
| Commission's Rules -- Broadband PCS |) | |
| Competitive Bidding and the Commercial |) | |
| Mobile Radio Service Spectrum Cap |) | |
| |) | |
| Implementation of Sections 3(n) and |) | GN Docket No. 93-252 |
| 332 of the Communications Act |) | |
| |) | |
| Regulatory Treatment of Mobile Services |) | |

COMMENTS OF RADIOFONE, INC.

Radiofone, Inc. ("Radiofone") hereby submits its comments in response to the *Notice of Proposed Rulemaking* in the above-captioned proceeding. Radiofone believes that the Federal Communications Commission ("FCC" or "Commission") should forbear from enforcing the 45 MHz CMRS Spectrum Cap, found at Section 20.6 of the Commission's Rules (the "CMRS Spectrum Cap"), for reasons set forth in the September 30, 1998 petition for forbearance of the Cellular Telecommunications Industry Association ("*CTIA Forbearance Petition*"). Whether the Commission decides to forbear from enforcement of the Spectrum Cap, or otherwise modify the rule, it should issue the final decision in this proceeding prior to the March 23, 1999 starting date for the next auction for broadband PCS spectrum ("Auction No. 22"). By doing so, the Commission

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will eliminate the uncertainty faced by entrepreneurs and former C-Block auction participants that have attributable cellular interests and that seek to obtain 30 MHz C-Block licenses in markets having “significant overlap” with their cellular markets. It is Radiofone’s belief that swift action by the Commission to eliminate or forbear from enforcing the CMRS Spectrum Cap will lead to a more robust and competitive auction, and will help C-Block entrepreneurs to attract investors and form strategic relationships with incumbent cellular operators.

I. INTEREST OF RADIOFONE IN THIS PROCEEDING

Radiofone and its affiliates are the non-wireline cellular carriers in New Orleans, Baton Rouge and Houma-Thibodaux, Louisiana. In this regard, Radiofone is the last family-owned business to hold a cellular license for a top 30 market. Since 1995, Radiofone has encouraged the Commission to re-evaluate its CMRS Spectrum Cap in numerous FCC and court proceedings. Radiofone applauds the Commission for initiating a comprehensive review of its CMRS Spectrum Cap and related restrictions as part of its biennial review of its regulations pursuant to Section 11 of the Communications Act of 1934, as amended (the “Act”).

II. THE FCC SHOULD FORBEAR FROM ENFORCING THE SPECTRUM CAP

Radiofone agrees with CTIA that the Commission should forbear from enforcement of the rule consistent with its authority to do so under Section 10 of the Act. The CMRS market has experienced tremendous growth and increased competition and enforcement of the CMRS Spectrum Cap is no longer necessary to protect consumers and spur innovation in the public interest.

In its *Petition for Forbearance*, CTIA has demonstrated that forbearance is consistent with the Act, as well as the policy goals that the Commission has pledged to foster for CMRS, including the increase in services offered in the marketplace, the reduction in price for these new services, and the emergence of new technologies for the benefit of consumers.¹ Radiofone agrees with CTIA in this regard and further believes that any risk of competitive harm due to consolidation of excess CMRS spectrum in the hands of a single company is significantly outweighed by the potential benefits to be gained by facilitating access to capital for C-Block auction participants and providing these entities with the potential to form strategic relationships with incumbent cellular operators.

a. The Commission's Antitrust Analysis Under the CMRS Spectrum Cap is Outdated and Does Not Reflect the Realities of the Telecommunications Marketplace.

The Commission should forbear from enforcing the Spectrum Cap because increased competition between and among numerous sectors in the telecommunications industry are sufficient to reduce the risk of anticompetitive harm in most cases. As a result, the Commission's traditional antitrust analysis under the CMRS Spectrum Cap has become outdated and does not reflect the realities of the larger telecommunications marketplace in which wireless carriers must compete.

Under the CMRS Spectrum Cap, the Commission has limited the relevant product market to cellular, broadband PCS and SMR services, without considering other

¹ CTIA *Forbearance Petition* at 4-5.

communication services that compete with cellular, broadband PCS and SMR. These other services offer consumers alternatives to the three services included in the market, and in so doing prevent the firms that offer cellular, broadband PCS and SMR from raising prices above competitive levels. As Radiofone noted in its *Petition for Partial Reconsideration*, “there are many services which are not perfect substitutes for cellular, PCS and SMR, but which nonetheless are attractive substitutes for them for significant portions of the public.”² Such services include wireline telephone service, pay telephones, paging, narrowband PCS and wireless access (e.g., LMDS and 39 GHz) services, to name a few. Section 20.6 of the Commission’s Rules overlooks the impact of these other services, apparently because they are not perfectly interchangeable for cellular, broadband PCS and SMR. However, while competition has sharply increased between and among providers of all types of telecommunications services, the inquiry under the CMRS Spectrum Cap has remained unchanged. Radiofone has previously demonstrated that antitrust law does not require products to be perfect substitutes or that they be equally attractive to consumers to be considered part of the same market.³ The Commission should recognize this well-established principle and view the relevant product market broadly when it evaluates the level of competition and the continuing need for the CMRS Spectrum Cap. If the FCC views the wireless market in this more realistic context, it will certainly conclude that the Spectrum Cap is unnecessary in most cases and that no competitive harm will result from the use of a forbearance approach.

² See, *Petition for Partial Reconsideration of Radiofone, Inc.*, WT Docket No. 96-59, filed July 31, 1996 (“*Petition for Partial Reconsideration*”) at 4.

³ *Id.*, citing *United States v. Continental Can Co.*, 378 U.S. 441, 447-58 (1964), *Midwest Radio Co. v. Forum Publishing Co.*, 942 F.2d 1294 (8th Cir. 1991), *Cable Holdings v. Home Video, Inc.*, 825 F.2d 1559, 1563 (11th Cir. 1987) and *Frank Saltz & Sons v. Hart Shaffner & Marx*, 1985-2 Trade Cases (CCH) ¶ 66,768 (S.D.N.Y. 1986).

b. Reliance on Case-by-Case Determinations of Ownership Issues Would Best Serve the Public Interest.

Instead of relying upon a CMRS Spectrum Cap that was tailored to suit a pre-auction marketplace, the Commission can retain the rule from its books but primarily rely upon its authority to review mergers and other transactions on a case-by-case basis under Sections 214(a) and 310(d) of the Act. In so doing, the Commission will serve the public interest by reducing unnecessary regulation and create an environment that fosters greater competition and growth in the wireless industry. In cases where a merger or other transaction raises *bona fide* concerns of anticompetitive consequences, the Commission would still be able to invoke the rule.

The emergence of nationwide or near-nationwide competitors, including AT&T Wireless, Sprint PCS and Nextel, are evidence that the nature of competition in the CMRS industry has changed and that any concerns about the harmful effects of excess spectrum concentration in the hands of one company are simply unwarranted. The Commission recognized this fact early last year when it issued its Third Annual Report to Congress on the State of CMRS Competition ("*Third Annual Report*").⁴ Therein, the FCC noted that the mobile telephony market has achieved new highs in subscribership and new broadband PCS and digital SMR providers have achieved a significant presence in most major markets across the country.⁵ One significant outgrowth of nationwide competition that the industry has seen since the adoption of the *Third Annual Report* has been the emergence and popularity of rate plans featuring unlimited nationwide calling.

⁴ See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, *Third Report*, FCC 98-81 (*rel.* June 11, 1998).

⁵ *Id.* At 3, 14.

Even those subscribers who use their mobile phones exclusively for local or emergency calls are benefiting from rate plans that feature flat rate pricing, low per-minute charges, and unlimited off-peak calling, which are becoming the norm rather than the exception in the wireless industry. Other marketing and technological developments such as prepaid service, multiple product bundling and dual-mode phones, have also emerged in response to consumer demand. There is simply no evidence that these trends – and responsiveness to the needs of consumers – would abate if the Commission refrained from enforcing its CMRS Spectrum Cap. The Commission should therefore allow CMRS carriers, especially local or regional CMRS carriers such as Radiofone, the ability to obtain as much CMRS spectrum as they feel is necessary to respond to the demands of the marketplace.

III. THE COMMISSION SHOULD ACT QUICKLY TO MODIFY OR FORBEAR FROM ENFORCING THE CMRS SPECTRUM CAP BEFORE THE START OF AUCTION NO. 22

Whichever course of action is decided upon, Radiofone believes that the Commission should act quickly with regard to the CMRS Spectrum Cap, and in any event should announce its decision before the start of Auction No. 22. By issuing its decision before the start of the auction, the Commission will eliminate a significant source of regulatory uncertainty for entrepreneur cellular licensees that seek to invest in broadband PCS C-Block entrepreneurs, or to participate in Auction No. 22 on their own, and to obtain a 30 MHz PCS license (or licenses) having significant overlap with their cellular service area. If forbearance, elimination or modification of the CMRS Spectrum Cap is adopted, this would allow more entrepreneur-sized businesses to participate in the provision of advanced telecommunications services (for the benefit of consumers) and


would create even greater competition for licenses in the auction (for the benefit of taxpayers). On the other hand, by maintaining the CMRS Spectrum Cap in its present form through Auction No. 22 (or even the early rounds of the auction), the Commission would not be able to significantly increase the level of competition among providers of wireless services. Moreover, modifying the CMRS Spectrum Cap in advance of Auction No. 22 will encourage cellular incumbents to form other types of strategic relationships (*e.g.*, management arrangements, joint operating agreements and roaming agreements) with C-Block licensees in their market, thereby further promoting the ability of entrepreneurs and small businesses to prosper and compete. In rural markets, this is certain to help speed the delivery of advanced telecommunications services to the public.

IV. CONCLUSION

For the foregoing reasons, Radiofone respectfully requests the Commission to forbear from enforcing the CMRS Spectrum Cap, for reasons set forth in the *CTIA Forbearance Petition*.

Respectfully submitted,
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